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No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act?

THE PARTIES

Petitioner is the United States Army Corps of Engineers.

Respondents are Hawkes Co., Inc.; LPF Properties, LLC; and Pierce Investment Company.

CORPORATE DISCLOSURE STATEMENT

Respondents have no parent corporations and no publicly held company owns 10% or more of the stock.

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (Pet. App. at 1a-21a), is reported at 782 F.3d 994. The opinion of the district court (Pet. App. at 22a-43a), is reported at 963 F. Supp. 2d 868.

JURISDICTION

The court of appeals entered its judgment on April 10, 2015. The court of appeals denied the United States Army Corps of Engineers' petition for rehearing on July 7, 2015 (Pet. App.103a-104a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Legal Background

The Clean Water Act authorizes the Corps of Engineers to regulate certain discharges to "navigable waters" or "waters of the United States." 33 U.S.C. §§ 1311(a) & 1362(7). The term "navigable waters" has been variously defined by the Corps over the years, but this Court redefined the term most recently in *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the plurality defined "navigable waters" as Traditional Navigable Waters (capable of use in interstate commerce) and nonnavigable but relatively permanent rivers, lakes, and streams, as well as abutting wetlands, with a continuous surface water connection to Traditional Navigable Waters. *Id.* at 739-42. In a concurring opinion, Justice Kennedy opined that the Clean Water Act covered wetlands with a significant physical, biological, and chemical impact on Traditional Navigable Waters. *Id.* at 779. The Eighth Circuit has held the Corps can establish federal jurisdiction over wetlands under either the plurality's

"continuous surface water" test or Justice Kennedy's "significant nexus" test. *See United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). In this case, the Corps relied on the "significant nexus" test.

The Clean Water Act is unique; it requires an expert "to determine if [it] even appl[ies] to you and your property." Pet. App. at 20a (Kelly, J., concurring). This is because the "reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by [federal] employees as wetlands covered by the Act " *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). Since the inception of the Act in 1972, "[t]he Corps has [] asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Rapanos*, 547 U.S. at 722. This implicates "the entire land area of the United States." *Id.* "Any plot of land containing such a channel may potentially be regulated as a 'water of the United States.'" *Id.*

To provide some clarity to agency officials and the regulated public for this expansive assertion of jurisdiction, that Congress did not intend and could not have foreseen, the "Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities." 33 C.F.R. § 320.1(a)(6). A formal Approved Jurisdictional Determination, or JD, provides a site-specific delineation of wetlands or other waters subject

to regulation under the Clean Water Act, along with detailed physical, chemical, and biological data in support of the determination. 33 C.F.R. § 331.2. The regulations themselves declare a "determination pursuant to this authorization shall constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6). The regulations also provide for Preliminary JD's that are written indications that there may be "waters of the United States" on a parcel. 33 C.F.R. § 331.2. But the Corps states these JD's are only "advisory in nature and may not be appealed." Pet. Opening Brief at 25(a).

The Corps not only interprets jurisdictional "waters of the United States" expansively, the Corps interprets jurisdictional waters inconsistently. This is confirmed by a report from the General Accounting Office (GAO) cited by this Court in *Rapanos*, 547 U.S. at 725. The report documents the Corps' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Clean Water Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004). This is because "'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (citation omitted).

In its effect, a Jurisdictional Determination requires property owners to: (1) abandon all use of the regulated portion of the land (often at ruinous cost); (2) seek a potentially unnecessary permit (often at

ruinous cost)[1]; or, (3) proceed with an otherwise lawful use of the land (risking ruinous fines[2] and imprisonment).

Corps regulations authorize an administrative appeal of an Approved JD. The procedure for this appeal is the same for an appeal of a permit denial or a permit that is declined by the applicant. *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. part 331.").

An action brought in the federal courts is subject to the requirements of the Administrative Procedure Act (APA). The APA states "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The general test for determining final agency action is often described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process." And second, "the action must be one by which 'rights or obligations have been determined,'" *or* from which "'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). Finally, the agency action must be

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[1] According to this Court, the "average applicant for an individual permit [as in this case] spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide [more general] permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 719.

[2] The Clean Water Act authorizes fines up to $37,500 a day. Pet. Opening Brief at 9 n.4.

one for which there is no other remedy in court other than APA review.

This case involves a challenge to a formal Approved Jurisdictional Determination issued by the Corps after an administrative appeal. Respondent Hawkes argues the JD is invalid (as determined by a Corps Review officer) and the project site is not subject to the Clean Water Act under any relevant standard. The Corps defends its JD on the basis the determination is not final agency action under *Bennett* and Respondent Hawkes has an adequate remedy in court; Hawkes can seek a permit, then decline the permit and seek redress in court for the contested Jurisdictional Determination. Or, if the permit is denied, Hawkes can challenge the need for a permit in court. In other words, Hawkes must go through the costly and time-consuming permit process before a court can determine whether Hawkes was required to go through the costly and time-consuming permit process in the first instance.

The Eighth Circuit Decision

The trial court dismissed the challenge to the Jurisdictional Determination on a 12(b)(6) motion for lack of subject matter jurisdiction under the APA, However, the Eighth Circuit Court of Appeals held formal Approved Jurisdictional Determinations represent final agency action subject to immediate judicial review. According to the Eighth Circuit, the Jurisdictional Determination is conclusive as to federal jurisdiction under *Sackett* and Hawkes has no other adequate remedy in court:

> The Corps's assertion that the Revised JD is merely advisory and has no more effect than

> an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S. Ct. 1154. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with "the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune." "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). We conclude that an Approved JD is a final agency action and the issue is ripe for judicial review under the APA.

Pet. App. at 16a-17a.

The court determined the test for APA finality is based on "practical considerations" and the Corps grossly understated the impact of a JD by "exaggerating the distinction between an agency order that compels affirmative action," like the compliance order in *Sackett*, "and an order that prohibits a party from taking otherwise lawful action," like the JD in this case. The Eighth Circuit found "[n]umerous Supreme Court precedents confirm that this is not a basis on which to determine whether 'rights or obligations have been determined' or that 'legal consequences will flow' from agency action." *Id.* at 11a.

In her concurring opinion, Judge Kelly added:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*. *See Sackett*, 132 S. Ct. at 1374-75 (Ginsburg, J., concurring). Accordingly, I concur in the judgment of the court.

Pet. App. at 20a-21a.

The judgment of the Eighth Circuit conflicts with *Belle Co. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014) (aka *Kent Recycling* now pending on petition in this Court, 14-493), and *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008). This Court granted certiorari to resolve this conflict.

STATEMENT OF FACTS

The Property

The property at issue (the Property) is located in New Maine Township, Marshal County, Minnesota, and contains organic peat[3] found in wetland environments. JA at 13. In Minnesota, peat harvesting requires wetland replacement and restoration and is regulated under permits issued by the Minnesota Department of Natural Resources (MDNR). *Id.* The Property lies over 120 river miles from the nearest Traditional Navigable Water, the Red River of the North. *Id.* There is no continuous surface water connection between wetlands on the Property and a "water of the United States." *Id.* A farm, a separate, shallow ditch dug for farming purposes in an area the Corps concedes is upland at the border of the farm most distant from the Property, and another sizable upland area, are all located between the Property and the area the Corps claims is a "Relatively Permanent Water." *Id.* at 13-14.

Administrative Proceedings

In October, 2006, Hawkes obtained an option to purchase the Property, subject to receiving approval to conduct peat harvesting operations on the Property. *Id.* at 14. On March 20, 2007, Kevin Pierce, a Hawkes officer, met with representatives of the Corps and the Minnesota Department of Natural Resources. *Id.* The discussion at this meeting focused on potential

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[3] Peat is a "brown, soil-like material characteristic of boggy, acid ground, consisting of partly decomposed vegetable matter. It is widely cut and dried for use in gardening and as fuel[.]" *See* http://www.oxforddictionaries.com/us/definition/american_english/peat.

roadblocks to the plan to harvest peat on the Property, including discussion of the Property's status as a rich fen and a wetland. *Id.* at 14-15.

On January 15, 2008, Mr. Pierce again met with representatives of the Corps and the MDNR to review plans to conduct peat harvesting on the Property. *Id.* at 15. At this meeting, Mr. Pierce discussed with the Corps and MDNR representatives the high quality of the peat available at the Property and the importance to Hawkes' business of being able to harvest peat on the Property. *Id.* As Mr. Pierce explained, the peat available to Hawkes, as of January, 2008, provided the company approximately seven to ten years of future operations. *Id.* Mr. Pierce also explained that by expanding peat harvesting to the Property, Hawkes could extend the lifespan of its business by ten to fifteen additional years. *Id.*

On or about December 13, 2010, Hawkes applied for an individual permit from the Corps under Section 404 of the Clean Water Act to expand its existing peat harvesting operations to a portion of the Property—approximately 150 acres. *Id.* As part of its permit application, Hawkes identified fifteen sites that it had evaluated as potential alternatives to the Property. None of those sites provided a viable alternative to peat harvesting on the Property. *Id.*

In January, 2011, Mr. Pierce again met with the Corps and MDNR. *Id.* At that meeting, Corps representatives spent the majority of time attempting to persuade Mr. Pierce to abandon his plans to use the Property. *Id.* Corps representatives played up the cost associated with the permitting process; arguing there was no guarantee that a permit would ever be granted; and suggesting that, even if a permit were to be

granted, the process would take many years before it would be completed. *Id.* at 15-16. But Mr. Pierce stated his intent to proceed. *Id.*

On or about March 15, 2011, the Corps issued a letter to Hawkes stating the Corps had made a "preliminary determination" that the Property is a "water of the United States" and "is regulated by the Corps under Section 404 of the Clean Water Act." *Id.* at 16. The Corps' letter also stated that "at a minimum" an environmental assessment will be required. *Id.* Mr. Pierce again met with representatives of the Corps and the MDNR on April 23, 2011. *Id.* At that meeting, one of the Corps representatives, Tamara Cameron, stated the opinion that the Property would be completely and permanently destroyed if peat were to be harvested on the Property. *Id.* Ms. Cameron also stated it could take years before a permit would be granted and the process would be very costly. *Id.*

On May 31 through June 3, 2011, representatives of the Corps conducted a site visit of the Property. *Id.* At that time, a Hawkes employee told Steve Eggers, from the Corps, how important expanding operations to the Property was to Hawkes' ability to continue its business and how much he hoped that Hawkes would be able to begin harvesting soon. *Id.* In response, Mr. Eggers suggested the employee should start looking for another job, or words to that effect. *Id.*

On or about August 25, 2011, the Corps sent another letter to Hawkes with a list of nine additional information items that would be needed for the permit application. *Id.* at 17. These included hydrological assessments of the wetland and of groundwater flow spatially and vertically, functional resource assessments including vegetation surveys,

inventorying and analyzing the quality of wetlands in the entire watershed, evaluation of *upstream* potential impacts, and more. *Id.* The cost of performing all of these requirements is estimated to exceed $100,000. *Id.*

Faced with these overly burdensome demands by the Corps, Hawkes put its permit application on hold and asked the Corps to justify its preliminary Jurisdictional Determination. *Id.* On November 1, 2011, representatives of the Corps met with the then owner of the Property. *Id.* Although Mr. Pierce had asked to be present in any meeting between the Corps and the landowner, the Corps chose to exclude him from this meeting. *Id.* At the meeting, the Corps representatives stressed to the landowner the harm that would result if peat harvesting were to be permitted on the Property and insisted the landowner try to sell the Property to a wetlands bank or to another party. *Id.* The Corps made these statements even though the Corps representatives were aware Mr. Pierce had obtained an option to purchase the Property. *Id.* The Corps also indicated there is a very good possibility that a full Environmental Impact Statement would be required for the project that would delay issuance of any permit for several years. *Id.* at 17-18.

On November 8, 2011, the Corps provided Hawkes with a copy of a draft Jurisdictional Determination for the Property. *Id.* at 18. The draft JD claimed the Property was connected by a Relatively Permanent Water through a series of culverts and unnamed streams which flowed into the Middle River and then to a Traditional Navigable Water (the Red River of the North) 120 miles away. *Id.* The Corps, therefore,

deemed the Property subject to Corps' jurisdiction under the Clean Water Act. The draft JD did not determine whether there was a significant nexus between the Property and any navigable waters. *Id.*

On December 1, 2011, Corps representatives conducted a site visit of the Property for the purpose of making a formal Approved Jurisdictional Determination. *Id.* By correspondence dated December 19, 2011, Hawkes, through their wetland consultant, identified numerous errors in the draft JD and provided the Corps with additional information to be considered in connection with its formal site investigation. *Id.* This information showed there was no Relatively Permanent Water that connected the Property to a Traditional Navigable Water. *Id.*

On or about February 7, 2012, the Corps issued a formal Approved Jurisdictional Determination (the "Initial JD"), concluding there was a "significant nexus" between the Property and the Red River of the North and, accordingly, the Property was a "water of the United States" subject to Corps' jurisdiction. *Id.* On or about April 4, 2012, Hawkes filed a timely appeal of the JD under 33 C.F.R. § 331.6 setting forth the reasons why the Property is not a "water of the United States." *Id.* at 18-19.

On or about April 23, 2012, the Regulatory Appeals Review Officer sent Hawkes' consultant a letter stating the appeal was appropriate for consideration. *Id.* at 19. The parties presented their oral arguments before the Review Officer on July 24, 2012, and an Administrative Appeal Decision was issued on October 24, 2012, finding the appeal had merit and the administrative record "[did] not contain sufficient documentation/analysis to support a finding

of Clean Water Act jurisdiction." *Id.* The Administrative Appeal Decision noted, among other things:

> • "The [Administrative Record] does not contain data supporting flow regime, volume, duration, or frequency from the wetlands to the river. Additionally, the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative date [sic] given to support the finding." (footnote omitted)
>
> • "While the [Administrative Record] provides information indicating an OHW [i.e., "ordinary high water"] mark for the unnamed tributary exists, it does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW [Traditional Navigable Water]." (footnote omitted)
>
> • "The [Administrative Record] included a description of the stream channel riparian corridor from the unnamed tributary to the TNW However, the water flow regime information was not sufficient to indicate that a significant nexus exists." (footnote omitted)

Id. at 19-20.

Following remand, on or about December 31, 2012, the Corps issued a revised JD (the "Revised JD") and advised that the Revised JD is a "final Corps permit [sic] decision in accordance with 33 C.F.R. § 331.10."

Id. at 20. According to 33 C.F.R. § 331.21, Plaintiffs are considered to have exhausted their administrative remedies when a final decision is made pursuant to 33 C.F.R. § 331.10. JA at 20.

The Revised JD did not contain additional data that would support a significant nexus between the Property and the Red River of the North. *Id.* However, the Revised JD still purportedly relies on Justice Kennedy's "significant nexus" test to assert jurisdiction over the Property, which is described by the Revised JD as a "Non-Relatively Permanent [Water] that flow[s] directly or indirectly into [a] Traditional Navigable [Water]." *Id.*

The Revised JD did not correct the deficiencies of the Initial JD that would demonstrate how the Property, either quantitatively or qualitatively, significantly affects the physical, biological, and chemical integrity of the Red River of the North located 120 river miles from the Property. *Id.* at 20-21. Even though the Corps had two years to establish jurisdiction, its Revised JD, like the Initial JD, speaks only to the overall functions provided by wetlands and stream headwaters in general. *Id.* at 21. As the Review Officer found, it does "not speak to how the specific onsite wetland and tributaries have a significant nexus that is more than speculative or insubstantial on the chemical, physical or biological integrity of the downstream TNW." *Id.*

Any further efforts to obtain a permit to conduct peat harvesting on the Property would be futile, either because the Corps has already decided that it will not issue a permit or because the delay and expense of finally obtaining a permit would substantially impede,

if not prevent, Hawkes from proceeding with its plans to harvest peat on the Property. *Id.*

SUMMARY OF THE ARGUMENT

This case arises from a challenge to a formal Approved Jurisdictional Determination, or wetlands delineation, issued by the U.S. Army Corps of Engineers concluding peat bogs found on Respondents' property are subject to the Clean Water Act because the Property has a purported "significant nexus" with downstream "navigable waters." Hawkes contests this conclusion as contrary to the Act and Supreme Court precedent and seeks to have the JD overturned under the Administrative Procedure Act.

The APA "'creates a presumption favoring judicial review of administrative action.'" *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. at 1373 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984)). That presumption applies in this case. Like the Sacketts, Hawkes is subject to agency strong-arming under the law.

The Corps has conceded the Jurisdictional Determination is the agency's final word on jurisdiction. A plain reading of the APA should satisfy the "final agency action" requirement without further analysis. However, under *Bennett*, this Court has generally required such actions to have a particularized legal consequence. This Court employs a practical approach to determine if the agency action changes the legal regime or fixes a "right" or "obligation," even if the agency action does not have legal consequences independent of the underlying statute.

The JD in this case changes the legal regime by declaring through a formal site-specific adjudication that the Hawkes property contains "waters of the United States" subject to federal control under the Clean Water Act. The JD is conclusive as to federal jurisdiction and may be relied on for a period of five years. The JD has practical and legal consequences for the Corps and an inescapable coercive effect on Hawkes such that Hawkes is compelled to abandon any use of the Property (at ruinous cost), obtain an individual federal permit (at ruinous cost), or ignore the JD and proceed with the peat harvesting project without a permit and risk ruinous fines and criminal liability. The JD has other significant effects on Hawkes as well, including increased risk of liability, loss of an otherwise legal right to use the Property, and substantially increased costs.

Judicial review of the Jurisdictional Determination is consistent with this Court's case law, including *Sackett* and *Bennett*, and more particularly, *Abbott Labs.*, *Port of Boston*, and *Frozen Food Express*. The Corps has provided no contrary authority on facts analogous to this case. Therefore, the JD must be deemed "final agency action" under the APA.

Also, there is no "adequate remedy in court" that would justify any further delay in judicial review. The requirement that Hawkes go through a separate permit process before seeking judicial review, urged on this Court by the Corps, is nonsensical. The permit process is prohibitively costly in time and money, and punitive in effect. More importantly, it contributes nothing to the judicial resolution of the jurisdictional issue. It serves no litigation goal other than delay. The permit process does not, and cannot, advance the case

because it adds no relevant facts nor clarifies application of the law. The permit requirement is wasteful, unnecessary, and likely unconstitutional.

Additionally, the permit requirement undermines the presumption of reviewability and is tantamount to a decision on the merits in favor of the Corps. The primary reason to challenge the JD is to avoid the crippling cost and delay of an unnecessary permit. If Hawkes were to seek a permit and then successfully challenge the underlying Jurisdictional Determination in court, as the Fifth and Ninth Circuits require, Hawkes could never recover the needless expense of seeking the permit. This alone is sufficient to demonstrate the permit process is not an adequate remedy in court to challenge an erroneous jurisdictional claim.

Seeking judicial review by violating the Clean Water Act to trigger an enforcement action is likewise inadequate. The risk is too high. The penalties for discharging a pollutant without a permit are astronomical; tens of thousands of dollars a day in fines and criminal liability. Under *Ex parte Young*, a scheme requiring aggrieved parties to risk devastating fines and imprisonment to challenge the validity of a regulation is unconstitutional and invalid on its face.

Finally, the facts in this case give rise to numerous due process claims. This Court should rely on the constitutional avoidance canon and interpret the APA to avoid a constitutional conflict and allow immediate judicial review of the Jurisdictional Determination.

ARGUMENT

I

THE JURISDICTIONAL DETERMINATION IS FINAL AGENCY ACTION

The test for determining final agency action under the APA is generally described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process." And second, "the action must be one by which 'rights or obligations have been determined,'" *or* from which "'legal consequences will flow.'" *Bennett*, 520 U.S. at 177-78 (citations omitted). The second prong of the *Bennett* test is written in the disjunctive. Even if new "legal consequences" do not flow, the agency action may still be final if it determines "rights" *or* "obligations."

In furtherance of the "generous review provisions" of the APA, *id.* at 163, and the Act's strong presumption of reviewability, this Court's decisions take a pragmatic approach to finding agency action is final under the APA. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-50 (1967); *accord Bell v. New Jersey*, 461 U.S. 773, 779 (1983); and *Pacific Gas and Electric Co. v. State Energy Resource Conservation and Development Commission*, 461 U.S. 190, 200-01 (1983).

A. An Approved Jurisdictional Determination Is the Corps' Final Word on Jurisdiction

The Corps has abandoned its previous argument that an Approved Jurisdictional Determination is not the "consummation of the agency's decisionmaking process," as required under the first *Bennett* prong.

The Corps now concedes "the issuance of an approved jurisdictional determination marks the culmination of the distinct process by which the Corps informs a landowner whether the Corps believes that covered waters are present on a specified tract." Pet. Opening Brief at 26. This is a necessary concession because the argument is untenable under *Sackett*. In *Sackett*, this Court held a compliance order, that may be issued "on any information" and without any right of administrative review, is the agency's "last word" on jurisdiction, whereas the Jurisdictional Determination here is the result of a lengthy and detailed site-specific analysis concluding with an administrative appeal and remand.

> "As a logical prerequisite to the issuance of the challenged compliance order," the Sacketts contend, "EPA had to determine that it has regulatory authority over [our] property." *Id.*, at 54-55. The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question.

Sackett, 132 S. Ct. at 1374 (Ginsburg, J., concurring).

Under a literal reading of the APA, this should end the inquiry into the finality question. The APA states in relevant part that "final agency action[s] for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. This language is not ambiguous, and under the standard norms of statutory interpretation, the term "final" takes its ordinary meaning (i.e., conclusive or decisive). *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980) (holding the phrase "any other final action" in

§ 307(b)(1) of the Clean Air Act is clear and is to be construed in accordance with its literal meaning so as to reach any action of the Administrator that is final); *see also Sackett*, 132 S. Ct. at 1373 ("[T]he APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction."). Such a straightforward reading of the APA would give due deference to the presumption of reviewability on which the Act rests. *Id.*

Nevertheless, Hawkes addresses the second *Bennett* prong below.

B. Final Agency Action Does Not Require "Independent" Legal Consequences

Under the second *Bennett* prong, "the action must be one by which 'rights or obligations have been determined,'" *or* from which "'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). In evaluating whether legal consequences flow from an Approved Jurisdictional Determination, the Corps misconstrues the *Bennett* test. The Corps asserts, in reliance on the Fifth and Ninth Circuits, that legal consequences must flow from the JD, independent of the Clean Water Act. This is not the test.

In *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d at 594, the court held a JD cannot satisfy the *Bennett* second prong because "Fairbanks' legal obligations arise directly and solely from the CWA and not from the Corps' issuance of an approved jurisdictional determination." Similarly, in *Belle Co.*, 761 F.3d at 391-92, the Fifth Circuit held the

JD was not reviewable under the APA because legal consequences did not flow "independently" from that determination but from the CWA. However, neither of these circuits nor the Corps cites any controlling authority for that proposition.

The language of the APA does not require "agency action" to have "independent" legal consequences, either expressly or impliedly. If such a requirement were imposed on the APA, it would preclude judicial review of most, if not all, interpretive or declaratory decisions and eviscerate the Act. *See* 5 U.S.C. § 551(13) (Defining "agency action" as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent "); *id.* § 551(4) (Defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."); *id.* § 551(6) (Defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making."); and, *id.* § 551(11) (Defining "relief" as "the whole or a part of an agency—(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or, (C) taking of other action on the application or petition of, or beneficial to, a person.").

Moreover, no Supreme Court precedent is cited in support of this interpretation. There is, however, express contrary precedent. *Bennett* itself relied on *Port of Boston*, 400 U.S. at 70-71, that rejected the argument that a commission order about dockside storage fees "lacked finality because it had no

independent effect on anyone." The Court stated that argument had the "hollow ring of another era." *Id.* More importantly, the Court acknowledged agency actions "that have no independent coercive effect are common" and this Court had found such actions final and reviewable. *Id.* at 71.

According to this Court, "the relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Id.* If "rights," "obligations," or "legal consequences" do not flow "independently" from the agency action, they must flow from the underlying statute. Therefore, the question before this Court is not whether a JD has legal consequences beyond the Clean Water Act, but whether the JD determines if the "rights" and "obligations" imposed by the Act apply to aggrieved parties. Through "the orderly process of adjudication," that's exactly what the JD did here. *Id.* In *Abbott Labs.*, 387 U.S. at 148-54, this Court cited a string of cases that found agency action "final" under the APA that involved nothing more than an interpretation of a statute, including many of those cases relied on by the Eighth Circuit below.

C. An Approved Jurisdictional Determination Is Designed To Have Legal Consequences

A recurring theme in the Corps' argument is that, in its effect, an Approved Jurisdictional Determination is similar to an informal agency opinion or warning letter, or even a consultant's report, and is merely

advisory. *See* Pet. Opening Brief at 33. The Eighth Circuit rejected this argument:

> The Corps's assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169.

Pet. App. at 16a.

The "powerful coercive effect" of the Jurisdictional Determination in this case is that Hawkes must suffer grave consequences no matter what it does. Under the JD, Hawkes' only options are: (1) abandon the peat harvesting project, at great loss; (2) complete the permit process at exorbitant cost with no certainty of success; or (3) proceed with the project without a permit and incur crushing civil and criminal liability. The Corps simply ignores that reality when it argues a JD has no legal consequences.

The Corps appears to be confusing an informal Preliminary JD with a formal Approved JD. Corps' regulations provide for issuance of Preliminary Jurisdictional Determinations, which are "written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel." 33 C.F.R. § 331.2. Preliminary Jurisdictional Determinations do not reflect a final conclusion about whether "waters of the United States" are present. *Id.*; *see* U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 08-02, ¶¶ 4, 7 (June 26, 2008). Accordingly, Preliminary JD's "are advisory in nature and may not be appealed." Pet. Opening Brief at

25(a). This suggests that formal Approved JD's are something more than "advisory" in nature."

Contrary to a Preliminary JD that is more like an informal opinion letter, a formal Approved JD is based on a costly and extensive onsite investigation by the Corps itself: "Significant agency resources are necessary to perform the scientific and technical analysis required to produce" Jurisdictional Determinations. Pet. Opening Brief at 24. The investigator must consider the actual physical, chemical, and biological aspects of the site and draw complex factual and legal conclusions from the data gathered. *See* 33 C.F.R. § 331.9. Each investigation is different. Only an expert in this aspect of the law and science can make the final determination. "This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property." Pet. App. at 20a-21a (Kelly, J., concurring).

The Clean Water Act does not cover all waters. Therefore, jurisdictional waters must be determined on a case-by-case basis. This is the very purpose of the Jurisdictional Determination: "A landowner who procures a[n] [approved] jurisdictional determination, however, has the advantage of knowing the Corps' current, considered view as to whether there are waters of the United States on the landowner's property." Pet. Opening Brief at 22.

An Approved JD goes even further and determines what exemptions and permits apply: The "Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act to activities or tracts of land and the applicability of general permits or statutory

exemptions to proposed activities." *See* 33 C.F.R. § 320.1(a)(6).

The JD regulatory process even provides for a right of administrative appeal on exactly the same basis as a formal permit. *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. part 331."). Upon completion of an administrative appeal, Corps regulations declare a "determination pursuant to this authorization shall constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6). And, "[t]he determination reflects the agency's official view, and it will remain in effect for five years unless conditions change or new information comes to light." Pet. Opening Brief at 25.

An Approved JD has all the earmarks of final agency action: (1) it goes beyond the informal opinion of a Preliminary JD; (2) it is based on a costly and detailed site-specific analysis; (3) it addresses the "applicability of general permits or statutory exemptions;" (4) it represents the agency's "official view" on jurisdiction; (5) it is subject to the same administrative appeals process as a permit decision; (6) after appeal, the determination is considered "final agency action;" and (7) the JD can be relied on for five years. It is hard to believe the government would create such elaborate procedures and expend such extensive resources on a determination that was *not* intended to fix a legal "right" or "obligation." "It would be adherence to a mere technicality to give any

credence to [the government's] contention." *Abbott Labs.*, 387 U.S. at 152.

If the Act answered the question of whether a particular parcel contains jurisdictional wetlands, there would be no need for a Jurisdictional Determination. But there is such a need, as evidenced by the existence of the Corps regulations. It is the JD, not the Clean Water Act "that puts the administrative process in motion." Pet. App at 20a-21a (Kelly, J., concurring).

D. An Approved Jurisdictional Determination Has Legal Consequences for Permitting and Enforcement

The Corps repeatedly argues any relevant "rights" or "obligations" are determined by the Clean Water Act, not the Jurisdictional Determination. This is ironic in light of the Corps' admission that a JD is provided precisely because "[t]he CWA itself does not establish any mechanism whereby a property owner, without first seeking a permit or discharging without a permit, may obtain the government's view as to whether the Act applies to particular sites." Pet. Opening Brief at 3.

According to the Corps, a JD adds nothing to the Act, has no effect, and is not final agency action under the second *Bennett* prong. *See* Pet. Opening Brief at 20-44. But the same could be said of almost any agency action backed by statute, including a permit grant or a permit denial, which the Corps admits are reviewable under the APA. *Id.* at 45.

The JD here is reminiscent of the drug labeling requirement in *Abbot Labs.*, which the government argued was not reviewable because it could not be enforced directly but only when the Attorney General authorized "criminal and seizure actions for violations of the statute." *Abbott Labs.*, 387 U.S. at 151. This Court found "the argument unpersuasive" because "the agency does have direct authority to enforce this regulation in the context of passing upon applications for clearance of new drugs." *Id.* at 151-52.

Likewise, if a landowner discharges a pollutant into covered waters (as defined by the JD), without federal approval, the Corps has "direct authority" to rely on the JD in determining the nature of the violation. Moreover, with respect to the scope of covered waters, the Corps is legally bound by the JD during the permit process. *See* Pet. App. at 9a-10a. ("The Corps' Regulatory Guidance Letter No. 08-02, at 2, 5, described an Approved JD as a 'definitive, official determination that there are, or that there are not, jurisdictional "waters of the United States" on a site,' and stated that an Approved JD 'can be relied upon by a landowner, permit applicant, or other affected party for five years'").

Also, a third party can rely on the JD as prima facie evidence of a violation of the Clean Water Act. *See* Pet. App. at 34(a) (The Corps views the JD as final agency action "in the sense the public may rely on the determination."); *see also* Pet. Opening Brief at 3 ("In addition to establishing various government enforcement mechanisms, the CWA authorizes aggrieved private citizens to file suit against persons who are alleged to have made unlawful pollutant discharges into waters of the United States. *See* 33

U.S.C. § 1365(a)(1)[.]"). Such waters are defined by the JD.

If, on the other hand, a landowner discharges a pollutant into waters the Corps has determined are not covered by the Act (i.e., through a negative JD), the landowner can raise an estoppel defense against any related Corps enforcement action. *See Fairbanks North Star Borough*, 543 F.3d at 597 ("A negative finding would effectively assure [the landowner] that the Corps would not later be able to fault [the landowner's] failure to seek a permit.").

An Approved JD has very real legal consequences for the Corps, the landowner, and even the public. Under *Bennett*, it is enough if the agency action "alter[s] the legal regime to which the [agency] is subject." *Bennett*, 520 U.S. at 156. Therefore, the JD is final agency action under the APA.

E. An Approved Jurisdictional Determination Increases the Landowner's Potential Liability

In *Sackett*, this Court determined legal consequences flowed from the compliance order because, among other things, it increased the petitioners' potential liability "in a future enforcement proceeding." *Sackett*, 132 S. Ct. at 1372. So does the JD here.

The Eighth Circuit stated below an Approved Jurisdictional Determination increases "the penalties [Hawkes] would risk if they chose to begin mining without a permit" by exposing the landowner to "substantial criminal monetary penalties and even imprisonment for a knowing CWA violation." Pet. App. at 15a. The Corps does not dispute that such a risk

exists. Rather, the Corps affirms the increased risk of liability:

> The CWA does provide that a court, in assessing an appropriate civil penalty for a violation, should consider, *inter alia*, "any good-faith efforts" to comply with the CWA's requirements. 33 U.S.C. 1319(d). The statute also imposes criminal penalties for knowing violations of the CWA, 33 U.S.C. 1319(c)(2). A landowner's receipt of a jurisdictional determination—and its consequent knowledge that the agency believes the CWA applies—could be offered as evidence of the owner's knowledge of the CWA's applicability.

Pet. Opening Brief at 32.

The only argument the Corps offers in mitigation of this risk is that the Clean Water Act does not assign any particular weight to a Jurisdictional Determination. *Id.* Therefore, the risk is only contingent. *Id.* But the Corps cannot deny that scienter is an element of a knowing violation and that landowners cannot claim ignorance or mistake once they are in receipt of an Approved JD. This necessarily increases the landowners' potential for increased liability, which is substantial. For example, a negligent violation of the Act limits civil fines to $37,500 per day, but allows a fine of up to $50,000 per day (or more when adjusted for inflation) for a knowing violation and increases jail time from 1 to up to 3 years. 33 U.S.C. § 1319. The Eighth Circuit was correct in holding the JD is like a compliance order in this respect and, under *Sackett*, the JD is subject to immediate review.

F. An Approved Jurisdictional Determination Has Other Legal Consequences

The effects of the Approved Jurisdictional Determination in this case are "direct and appreciable." *See Bennett*, 520 U.S. at 178.

The Jurisdictional Determination severely limits Hawkes' ability to use the Property for peat harvesting because Hawkes must now obtain an individual Clean Water Act (section 404) permit before the project can proceed. This is no small matter:

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 C.F.R. § 320.4(a) (2004). The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Natural Resources J. 59, 74-76 (2002).

Rapanos, 547 U.S. at 721 (footnote omitted).

Those costs will likely be higher in this case because of the nine hydrological studies requested by the Corps, estimated at more than $100,000, and the looming requirement for a lengthy and costly Environmental Impact Statement the Corps has threatened to impose. JA at 17-18.

The JD has other, equally severe, consequences for Hawkes. It is axiomatic that the JD decreases the value of the property for peat harvesting and increases production, carrying, and loan costs. These effects are real and, in the aggregate, can effectively rob the landowner of all viable economic use. Simply depositing a bucket of soil in the wetland areas is a violation of the law. To say the JD has no consequences is to deny the obvious.

G. APA Review of an Approved Jurisdictional Determination Is Supported by Numerous Supreme Court Cases

The Corps has failed to cite a single Supreme Court case where APA review was denied in a case like this, where the agency action involved a case-specific adjudication and the applicant exhausted all administrative remedies, including appeal and remand. *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980), on which the Corps relies, is not such a case. Pet. Opening Brief at 37.

In *FTC*, the Federal Trade Commission served a number of oil companies with a complaint stating the Commission had "reason to believe" these companies violated the Federal Trade Commission Act. 449 U.S. at 234. However, that complaint did not purport to be the Commission's final word on the violation. Instead,

it provided the offending oil company with an opportunity to participate in an administrative hearing for the purpose of determining whether the oil company actually violated the Act. *Id.* at 241-43. An opportunity the oil company declined. *Id.* This Court held the complaint was not "final agency action" because it was not a final adjudicative decision and for that reason the complaint itself had no legal consequence. *Id.* at 243. But that is quite different from the JD in this case where the recipient has completed the administrative review process and the JD itself purports to be a final adjudicative decision on jurisdiction. *See* 33 C.F.R. § 320.1(a)(6). *FTC* is, therefore, not analogous to this case.

Having found no analogous Supreme Court case, the Corps goes to great lengths to distinguish this case from the compliance order in *Sackett* and the Biological Opinion in *Bennett*. But this misses the mark. Under the APA, a final agency action need not have the compulsory effects of a compliance order or the coercive effects of a Biological Opinion, although the JD is similar in effect. In her concurrence below, Judge Kelly observed that *Sackett* compelled judicial review of the JD in this case:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This

> jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*.

Pet. App. at 20a.

Although judicial review of a JD is consistent with *Sackett* and *Bennett*, this Court has granted judicial review of other agency actions more akin to the Jurisdictional Determination in this case.

In *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, cited by both *Sackett* and *Bennett*, this Court had to decide who had primary jurisdiction to review a rate order by the Maritime Commission and, in the process, this Court addressed the standard for determining final agency action. Relevant here is this Court's holding that agency orders need not create a new, independent legal consequence to be final. *Id.* at 70-71.

Citing *Frozen Food Express v. United States*, 351 U.S. 40 (1956), this Court concluded: "Agency orders that have no independent coercive effect are common" but that is not the "relevant consideration[] in determining finality." *Port of Boston*, 400 U.S. at 70-71. The relevant consideration, this Court stated, was "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined." *Id.* at 71. In that case, there was "no possible disruption of the administrative process" because there was "nothing else for the Commission to do." *Id.* So it is in this case. No further administrative review of the JD is required or even allowed. Now that the Corps has issued the JD, it will not revisit that determination even during the permit process. *See* Pet. Opening Brief

at 28. The JD is conclusive as to jurisdiction and legally binding on Hawkes and the Corps.

As for agency action that has "no independent coercive effect," an examination of *Frozen Food Express*, 351 U.S. 40, is helpful because it is most analogous to the present case. Frozen Food Express was a motor carrier that transported certain "agricultural commodities" that were exempt from regulation by the Interstate Commerce Commission, much like the remote wetlands in this case. When the Commission issued a determination that certain commodities were no longer subject to the agricultural exemption, Frozen Food Express sought to challenge the order in court. In determining the order was final and subject to judicial review, this Court recited these facts: (1) that "the determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities;" (2) that the "order" serves as a warning that transporting these commodities without authorization will subject the carrier to "civil and criminal risks;" (3) when unauthorized transportation occurs, the Commission can issue a cease and desist order enforceable in court; (4) that "[t]he 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs;" and (5) the "determination made by the Commission is not therefore abstract, theoretical, or academic." *Id.* at 43-44.

The facts here are remarkably similar to the facts in *Frozen Food Express*: (1) the determination that the wetlands on Hawkes' property are not exempt but

subject to federal jurisdiction has an immediate and practical effect on Hawkes' use of the Property, requiring federal approval to proceed; (2) the JD serves as a warning that anyone filling the wetlands at this site without authorization will be subject to civil and criminal liability; (3) when unauthorized filling occurs, the Corps can issue a cease and desist order enforceable in court; (4) a JD which classifies specific wetlands as subject to federal control is, indeed, the basis for Hawkes ordering and arranging its affairs; and (5) the JD is "not therefore abstract, theoretical, or academic." In its effect, the JD is virtually indistinguishable from the Commission's determination in *Frozen Food Express* that this Court found final and reviewable.

The only response the Corps offers to *Frozen Food Express* is that the ICC order in that case involved a rule of general applicability whereas this case does not. But, as the Eighth Circuit held below, the "JD is a determination regarding a specific property that has an even stronger coercive effect than the order deemed final in *Frozen Food Express*, which was not directed at any particular carrier." Pet. App. at 12a. In *Abbott Labs.*, this Court described the case this way:

> Although the dissenting opinion noted that this ICC order had no authority except to give notice of how the Commission interpreted the Act and would have effect only if and when a particular action was brought against a particular carrier, and argued that "judicial intervention (should) be withheld until administrative action has reached its complete development," 351 U.S., at 45, 76

> S.Ct. at 572, the Court held the order reviewable.

Abbott Labs., 387 U.S. at 150.

For the same reasons, the JD should be reviewable here.

Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), is another case relied on in *Bennett*. *Chicago* held that administrative determinations are reviewable if they "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Id.* at 113.

In this case, by reason of the Jurisdictional Determination, Hawkes is obliged to obtain a section 404 permit from the Corps if it wishes to proceed with its peat harvesting project. This obligation was only inchoate before the JD was issued. The Clean Water Act only requires a permit for discharges to "navigable waters" generally, which Hawkes can show do not exist on the Property. In contrast, the JD is an actual adjudicative decision requiring a federal permit for discharges on this specific property. It is a quintessential application of the law to the facts of the case. For the first time, this obligation is now final and conclusive; thereby denying Hawkes its legal right to proceed with the peat harvesting project without federal approval.

In addition to these cases, the Eighth Circuit relied on *Abbott Labs.* in which this Court held prescription drug labeling regulations were subject to pre-enforcement review as final agency action, because the regulations "purport to give an authoritative interpretation of a statutory provision" that puts drug

companies in the quandary of either incurring massive compliance costs or risking civil and criminal sanctions for distributing misbranded drugs. The Eighth Circuit found *Abbott Labs.* analogous to this case because the JD puts Hawkes in a similar quandary. In light of the JD, Hawkes must either "incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial penalties." Pet. App. at 11a.

Finally, the Eighth Circuit relied on *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), for the proposition that final agency action need not be self-executing, like the JD in this case. Pet. App. at 12a-13a. "Though the Revised JD is not-self-executing, 'the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction.'" *Id.* at 13a (citing *Sackett*, 132 S. Ct. at 1373). Under this Court's precedents, the Jurisdictional Determination here has all the hallmarks of final agency action.

H. The Approved Jurisdictional Determination Has "Independent" Legal Consequences

If this Court decides, contrary to Supreme Court precedent, to accept the Corps' argument that the second *Bennett* prong requires final agency action to have independent legal consequences, this Court should take into account the facts of this case. The facts show the Corps did not carry its burden of demonstrating a "significant nexus" between the Hawkes property and the Red River of the North 120 miles away.

This is a 12(b)(6) dismissal case wherein the facts are taken as asserted, as the Eighth Circuit did below. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (In a motion to dismiss, "a court must accept a complaint's allegations as true.").

The JD is based on the Corps' unsupported conclusion that the Property meets the "significant nexus" test proffered by Justice Kennedy in *Rapanos*. JA at 18-19. That test requires the Corps to show the Property has a significant impact on a Traditional Navigable Water. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). However, as alleged in the complaint, on appeal the Review Officer found: "the District states that indicators of the transport of energy, materials, and nutrients were observed during a site visit, but there is no quantitative [data] given to support the finding." JA at 48. The record "does not provide sufficient evidence to establish a significant nexus that the number of flow events, volume, duration, and frequency of water flowing through the tributary are such that it has an appreciable effect on the TNW [Traditional Navigable Water]." JA at 52-53. And, "the water flow regime information was not sufficient to indicate that a significant nexus exists." JA at 54. Nevertheless, on remand, the District Engineer issued the Approved JD without providing the missing data.

On these facts, the Corps should have issued a negative JD, finding no jurisdictional "waters of the United States" on Hawkes' property. Therefore, the permit requirement for Hawkes' peat harvesting project flows from the JD, not the Clean Water Act. But for the JD, Hawkes would be free to exercise its right to harvest the Property without federal approval.

The JD changed the legal regime and is final agency action under the APA.

II

THERE IS NO ADEQUATE REMEDY IN COURT

"Final" agency action is judicially reviewable under the APA if there is "no other adequate remedy in a court." 5 U.S.C. § 704. There is no such remedy for an Approved Jurisdictional Determination. The alternative of seeking a permit first or risking an enforcement action is not adequate. To the contrary, these approaches are prohibitive, wasteful, unnecessary, insupportable, and likely unconstitutional.

A. The Cost of Seeking a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Is Prohibitive

In *Rapanos*, this Court relied on the Sunding Report that estimated the average cost of seeking an individual permit (like that required here) at more than $270,000 and two years to process. The report estimated that even a nationwide permit would cost almost $29,000 and take almost a year to process. *See Rapanos*, 547 U.S. at 721.

The Corps quibbles with Sunding's data but offers no better. The Corps admits it has no formal reporting data on permit costs—either for nationwide or individual permits. Pet. Opening Brief at 48. Instead, the Corps relies on anecdotal evidence of sample projects or ad hoc interviews. *Id.* 48-49. The Corps' 2001 study on the cost of individual permits

inexplicably "excluded projects affecting more than three acres." Pet. Opening Brief at 49. This would necessarily skew the data to show a lower than average cost for such permits. The Corps data is more unreliable than the Sunding data, giving the Court every reason to take the Sunding estimates at face value.

Also, the Corps puts great weight on the fact that most permits are of the general or nationwide variety that cost much less than an individual permit. *Id.* at 48-49. But the Corps ignores the fact that an individual permit is required in this case. This is undisputed. Hawkes actually commenced the permit process to harvest 150 acres of peat on the Property but put things on hold when the Corps asked for expensive hydrological studies (estimated at $100,000), played up the cost and delay from a full Environmental Impact Statement, and pointedly suggested the Corps might never grant the individual permit after years of study. JA at 16-19. Whatever the average cost of an individual or nationwide permit, in this case the cost became prohibitive, even punitive. And should Hawkes ultimately win the case in court, after obtaining a permit or permit denial, Hawkes can never recover the costs expended in the permit process. Pet. App. at 14a. Only those who can afford to seek a permit and the subsequent cost of litigation, which can also run into hundreds of thousands of dollars, can ever be vindicated. Therefore, Hawkes sought immediate judicial review of the JD in court.

B. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Is Wasteful and Unnecessary

If a landowner wishes to contest an erroneous Jurisdictional Determination, it should be unnecessary for the landowner to seek a permit after the administrative appeal. The process is costly and time consuming yet it contributes nothing to the judicial resolution of the jurisdictional issue. The Corps admits it will not revisit the JD during the permit process, except in the unusual case of changed circumstances. *See* Pet. Opening Brief at 28. The permit process does not make a JD more fit for judicial review. It would neither add any relevant facts nor clarify application of the law. It's a costly and pointless exercise which the law does not abide.

Stated in various ways, the ancient maxim "lex non cogit ad inutilia," or "the law does not know useless acts," has been a fundamental tenet in Anglo-American jurisprudence for centuries. *See Seaconsar Far East, Ltd. v. Bank Markazi Jomhouri Islami Iran*, [1999] 1 Lloyd's Rep. 36, 39 (English Court of Appeal 1998); *People ex rel. Bailey v. Greene County Supervisors*, 12 Barb. 217, 221-22 (N.Y. 1851); *see also Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act."); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 246 (1845) ("[T]he law never requires a vain act."); and *Stevens v. United States*, 2 Ct. Cl. 95, 100 (1866) ("[T]he law does not require the performance of a useless act.").

The Corps seeks to impose a useless permit requirement on landowners to delay or avoid its

untested claims of jurisdiction which are often wildly broad and unpredictable. This is because "'the definitions used to make jurisdictional determinations' are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (citing U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004)).

There is no regulatory or statutory provision that requires Hawkes to seek a permit that has nothing to do with the underlying jurisdictional challenge, to obtain APA review. To the contrary, a JD, standing alone, is as fit for judicial review as any permit decision. *See* 33 C.F.R. § 320.1(a)(6) ("A [jurisdictional] determination pursuant to this authorization shall constitute a Corps final agency action."). Corps regulations acknowledge the JD as a separate, adjudicatory action on a par with a permit decision. They even provide for identical administrative appeal procedures as a predicate for judicial review. *See* 33 C.F.R. § 320.1(a)(2) ("A district engineer's decision on an approved jurisdictional determination, a permit denial, or a declined individual permit is subject to an administrative appeal by the affected party in accordance with the procedures and authorities contained in 33 C.F.R. Part 331. An affected party must exhaust any administrative appeal available pursuant to 33 C.F.R. Part 331 and receive a final Corps decision on the appealed action prior to filing a lawsuit in the Federal courts (*see* 33 C.F.R. 331.12).").

It would be perverse, therefore, to require a landowner to go through the costly and time-consuming process of obtaining a JD and administrative appeal, then require the landowner to

run the gauntlet of a costly and time-consuming process of seeking a permit and another administrative appeal that has nothing to do with the question of jurisdiction. This approach is unnecessary and undermines the presumption of reviewability.

Moreover, rather than preserve private and judicial resources, the permit requirement squanders resources. First, it requires a costly and lengthy process that adds nothing to the case. This drains both private and agency resources to no beneficial end. Second, if a court ultimately decides a permit was not required, neither the landowner nor the Corps can recover the costs expended in processing an unnecessary permit. Pet. App. at 14a. Third, the issues surrounding a permit, such as mitigation, timing, restoration, etc., are all issues that are irrelevant to the jurisdictional question and are more likely to complicate rather than expedite the case. And fourth, the permit requirement defies commonsense. Why is it necessary to seek a permit to determine whether a permit was required in the first place? As Judge Kelly noted in her concurrence below, this is an odd and circuitous route to judicial review.

> Despite the[] dissimilarities with the circumstances in *Sackett*, I agree that Hawkes is left without acceptable options to challenge the JD, absent judicial review. Hawkes's choice is to either (1) follow through on their peat-mining plans until either the EPA issues a compliance order or the Corps commences an enforcement action, to both of which Hawkes could raise lack of CWA jurisdiction as a defense; or (2) apply for a permit (on the grounds that no permit is

> required) and, if the application is denied, appeal the denial in court. But what happens if Hawkes is, after all, granted a permit yet maintains it never needed one in the first place? It must decline the permit and challenge the original jurisdiction in court. This roundabout process does not seem to be an "adequate remedy" to the alternative of simply allowing Hawkes to bring the jurisdictional challenge in the first instance and to have an opportunity to show the CWA does not apply to its land at all.

Pet. App. at 20a.

C. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Is Tantamount to a Decision on the Merits

The obvious purpose of seeking immediate judicial review of an Approved Jurisdictional Determination is to avoid the unnecessary cost and delay of seeking a permit. Given the expense and uncertainty associated with seeking a permit, very few would have the ability to pile on even more expense and delay in court just to determine whether the Corps's claim of jurisdiction was correct. The impact on Hawkes would be severe; expanding to the new property is essential to the company's future growth. JA at 14-15. A win in court is a hollow victory if the landowner has already endured the arduous permit process without any hope of recouping the attendant costs. But, this is by design:

> The prohibitive costs, risk, and delay of these alternatives to immediate judicial review

> evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court's limiting decision in *Rapanos*. The Court's decision in *Sackett* reflected concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court concluded that was contrary to the APA's presumption of judicial review. "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." 132 S. Ct. at 1374.

Pet. App at 15a-16a.

Requiring a permit before judicial review of a JD denies Hawkes any meaningful remedy in court.

D. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Circumvents the Intent of Congress

Once it is acknowledged that an agency action is final, the only thing remaining is to ensure the aggrieved party has an "adequate remedy in a court." 5 U.S.C. § 704. This is not a limitation on judicial review. Rather, it is a mandate to ensure the intent of Congress is carried out—"[T]he APA provides for judicial review of all final agency actions." *Sackett*, 132 S. Ct. at 1373. Therefore, any process imposed on the aggrieved party must *facilitate* judicial review. But the permit requirement is not such a process. It obstructs judicial review.

The Jurisdictional Determination is valid for five years and the Corps cannot revisit the determination during the permit process, except in changed circumstances. *See* Pet. Opening Brief at 28. Therefore, the permit process cannot aid in resolving the underlying dispute—whether the Hawkes property contains "waters of the United States" subject to federal regulation under the Clean Water Act. Its sole purpose is to delay or deter judicial review.

Imposing the permit requirement on Hawkes allows the Corps, rather than Hawkes, to set the time for judicial review, contrary to congressional intent. The Corps can use the permit process to delay or avoid judicial review of a permit decision, and hence the jurisdictional question, indefinitely. The Corps can declare the permit application incomplete, or fail to process the application in a timely manner, or even refuse to issue a permit decision at all so as to avoid

judicial review of its jurisdictional decisions. By that means, the Corps can wear down the applicant so the applicant must accede to all Corps demands or walk away from the project at great loss.

This Court found the option of waiting on an enforcement action inadequate as a remedy in the *Sackett* case in part because of the landowners' inability to initiate judicial review. *See Sackett*, 132 S. Ct. at 1372. The same reasoning applies here. The pace of the permit process is dictated by the Corps.

To illustrate, in *Moore v. United States*, 943 F. Supp. 603 (E.D. Va. 1996), taxpayers sought a refund of taxes paid to the Internal Revenue Service, arguing they could claim as a loss the involuntary conversion of some of their investment property (called "the Boy Scout Tract") as a result of the land being reclassified as wetlands. *Id.* at 607. Though the Moores had not tried to obtain a section 404 permit, they argued the denial of a permit should not be a prerequisite to their claim, because seeking a permit would have been futile. As reported by the Court, several experienced individuals, including Bernard Goode, an environmental consultant that had been a Corps employee for 34 years, testified on the Moores' behalf:

> When asked for his opinion concerning the likelihood that [an individual] § 404 permit would be issued for the Boy Scout Tract, Goode testified: "It is my opinion that there was a very low likelihood that this project would have been approved." When asked about the likelihood that a § 404 permit for the Boy Scout Tract would have been formally denied, Goode testified:

"It has been my experience in studying this very issue nationwide that there was a very low likelihood that the Corps would have denied the application. Because the Corps can't reach that point until they have gone through the full analysis, which includes the mitigation sequencing.

"And it is a much more likely outcome that more and more information is requested until eventually the applicant loses staying power and either withdraws the application himself, or the Corps says because of the lack of information to continue the valuation, the Corps withdraws the application.

"And that is the outcome of well over half of the 404 applications.

"Here in the Norfolk district I looked at some statistics and there is [sic] over 3/4 of the cases [that] end up being withdrawn for section 404 permit applications. Only one percent end up being denied."

Goode's testimony on this latter point was corroborated by the Moores' other two expert witnesses. Robert Kerr ("Kerr"), an environmental consultant with experience in over sixty (60) § 404 permit applications, testified:

"We advised the [Moores] that there was no chance of getting a permit.

"We also told Mr. Moore [the Corps] would never reject the permit.

> "Because rejecting a permit could set a precedent also. And as the government's attorney stated, you have to have a permit denial to go for a taking.
>
> "Well, the Corps knows that and will not issue a denial, an open denial. They will just request additional information, and more additional information, and the more you give them the more they ask for They basically bleed a client to death financially until you have spent so much money on the alternatives analysis you've drained the profitability out of the project."
>
> Doug Davis ("Davis"), an environmental consultant who at one time worked in the Corps' wetlands program, testified that the likelihood of a permit being issued for the Boy Scout Tract was "as close to zero as it can get," and that a permit would not have been finally denied because projects like that contemplated for the Boy Scout Tract "just sort of wither on the vine and no final agency action is taken." In addition, both Kerr and Davis testified that completing the § 404 permit process in this case would have been a very lengthy and expensive proposition, costing hundreds of thousands of dollars.

Id. at 612 (citations omitted).

This excerpt demonstrates the remarkable leverage the Corps has over CWA permit applicants. With very little risk to the agency, the Corps can scuttle a project with dilatory practices or condition approval on extraordinary demands.

The inability of a landowner to seek judicial review of an Approved Jurisdictional Determination shields the Corps from suit and allows the agency to exercise plenary authority over disputed waters with impunity. The APA should not be read to allow such a blatant subversion of the law. This is not an adequate remedy in court.

E. Requiring a Landowner To Seek a Permit Prior to Judicial Review of an Approved Jurisdictional Determination Undermines the Presumption of Reviewability

In *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), this Court discussed the legislative and common law history of the APA and concluded the Act is animated by "the strong presumption that Congress intends judicial review of administrative action." That presumption, ignored by the Corps, dictates that statutory limitations on judicial review of agency action should be interpreted narrowly. *See id.* ("'[J]udicial review of a final agency action by an aggrieved person shall not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" (quoting *Abbott Labs.*, 387 U.S. at 140)). This strong presumption requires "that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review [of administrative action].'" *Id.* at 671 (quoting *Abbott Labs.*, 387 U.S. at 141). But the Corps has provided no such evidence.

The Corps' argument that Congress intended the permit process to provide the sole means of access to the Courts for review of JD's has no support in the law.

Neither the CWA nor its implementing regulations show "clear and convincing evidence" that Congress intended judicial review of administrative decisions only after completion of the permit process. *See Sackett*, 132 S. Ct. at 1372 ("Nothing in the Clean Water Act *expressly* precludes judicial review under the APA or otherwise.").

In *Sackett*, this Court rejected EPA arguments that the Clean Water Act was intended to preclude review of nonpermit decisions. The EPA argued judicial review of compliance orders would undermine the Clean Water Act because such orders serve an informational purpose and are designed to encourage voluntary compliance and avoid judicial proceedings. *Id.* at 1372. The Corps says the same for Jurisdictional Determinations here. Pet. Opening Brief at 20. But this Court held, "It is entirely consistent with this function to allow judicial review when the recipient does not choose 'voluntary compliance.'" *Sackett*, 132 S. Ct. at 1373. "The Act does not guarantee the EPA that issuing a compliance order will always be the most effective choice." *Id.*

The EPA also argued the compliance order was not reviewable under the APA because the order was not self-executing. However, this Court rejected the argument outright observing "the APA provides for judicial review of all final agency actions, not just those that impose [] self-executing sanction[s]." *Id.* This is consistent with this Court's application of the APA in other cases, such as *Abbott Labs.*, *Bennett*, *Port of Boston*, and *Frozen Food Express* discussed above.

Finally, the EPA warned in *Sackett* it was less likely to use compliance orders if they are subject to immediate judicial review. This Court did not consider

that rationale a reason to preclude judicial review of compliance orders. *Id.* To the contrary, the Court explained, "That may be true—but it will be true for all agency actions subjected to judicial review." *Id.* at 1374. And, indeed, the Corps makes this same claim for Jurisdictional Determinations here. *See* Pet. Opening Brief at 37. But this Court held the presumption of reviewability trumps such concerns:

> The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.

Sackett, 132 S. Ct. at 1374.

That conclusion applies equally to Jurisdictional Determinations. According to the agency, the "Corps issues tens of thousands of approved jurisdictional determinations every year. [However] in fiscal year 2015, interested parties filed [only] eight administrative appeals of approved jurisdictional determinations issued outside of the permitting process." Pet. Opening Brief at 5-6.

The dearth of appeals does not indicate a lack of need for judicial review; rather, it demonstrates that opening the courthouse doors to judicial review of JDs will not undermine the Corps program in that few landowners challenge the Corps' decisions. Curtailment of the JD program is unlikely and would be counterproductive. It is the Corps that has the most to gain by continuing the JD program, even if JD's are subject to immediate judicial review. Statistically, all but a few recipients (i.e., eight in 2015) defer to the agency's determination on jurisdiction. This allows the Corps to implement the Clean Water Act with wide discretion without pursuing tens of thousands of enforcement actions that would result from curtailing or eliminating JDs. Therefore, providing judicial review of JDs will not deter Corps reliance on Jurisdictional Determinations, but it would potentially bring justice to those who have a legitimate grievance with the Corps over the scope of federal authority under the Clean Water Act.

The Clean Water Act does not "preclude judicial review" under the APA, 5 U.S.C. § 701(a)(1). The APA creates a "presumption favoring judicial review of administrative action." *Block v. Community Nutrition Institute*, 467 U.S. at 349. While this presumption "may be overcome by inferences of intent drawn from the statutory scheme as a whole," *id.*, the Corps' arguments do not support an inference that the Clean Water Act's statutory scheme precludes APA review.

F. An Enforcement Action Is Not An Adequate Remedy in Court

The Corps argues Hawkes has an adequate remedy in court because Hawkes can proceed with the project without federal approval and precipitate an

enforcement action by the Corps, the EPA, or a third-party citizen. In each case, the Corps maintains Hawkes could seek review of the jurisdictional question in any subsequent judicial proceeding. Pet. Opening Brief at 50. But this is far from adequate.

In *Sackett* this Court rejected the idea that the Sacketts could seek judicial review in an enforcement proceeding because they "[could not] initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability," not to mention criminal sanctions. *Sackett*, 132 S. Ct. at 1372. The situation in this case is no better. If Hawkes proceeds with the peat harvesting project without a permit, Hawkes has no control over the timing or nature of the ensuing enforcement action. In *Sackett*, EPA officials issued a verbal cease and desist order but left the Sacketts hanging for more than six months before issuing a compliance order. The government could do the same here. Likewise, there is no telling if or when a third party may bring a citizen suit against Hawkes. But onerous penalties would accrue from the first day of the unauthorized discharge. An enforcement action could be delayed for years without judicial review, wearing down the landowner to compel compliance.

This Court rejected such an approach in *Ex parte Young*, 209 U.S. 123 (1908). In that case, this Court considered the validity of a shipping rate increase imposed on railroads by the state legislature. The railroads took the position the rates were "unjust, unreasonable, and confiscatory." *Id.* at 130. Anyone who refused to adhere to the rate increases, including the officers and employees of the railroads, would be

subjected to severe civil and criminal liability. *Id.* at 130-31. But the only way to test the validity of the rate orders was to disobey the order and risk such liability. This Court held the order raised a serious constitutional question:

> But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.

Id. at 146.

This Court held: "when the remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given." *Id.* at 147.

> It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

Id.

The enormity of the penalties for violating the Clean Water Act are well documented and may include penalties of tens of thousands of dollars a day and

imprisonment, with heightened sanctions for knowing violations. *See* 33 U.S.C. § 1319. Thus, under *Ex parte Young*, triggering an enforcement action to challenge the validity of a Jurisdictional Determination raises a constitutional question and is not an adequate remedy in court. Moreover, because the requirement to seek an individual permit in this case would itself be "unjust, unreasonable, and confiscatory," even that requirement would raise a constitutional question and fail to provide an adequate remedy in court.

G. The APA Should Be Interpreted To Avoid Constitutional Questions

In addition to the constitutional questions raised above under *Ex parte Young*, it should be observed that in *Kent Recycling Services v. U.S. Army Corps of Engineers* (14-493), now pending in this Court, the petitioner raised a due process challenge to the Jurisdictional Determination on facts nearly identical to the facts in this case. In that case, as in this case, the Corps issued a final Approved Jurisdictional Determination without correcting the deficiencies identified by the Corps Review Officer on administrative appeal. Kent Recycling Pet. at 9. The Approved JD was demonstrably invalid and its issuance deprived the landowner of the right to use its property without a fair hearing. *See Lassiter v. Dep't of Social Services*, 452 U.S. 18, 24 (1981) ("'[D]ue process has never been, and perhaps can never be, precisely defined. [But] the phrase expresses the requirement of 'fundamental fairness.'"). Although Hawkes did not raise a due process challenge to the JD in this case, the case does give rise to such a claim. In fact, there are a number of circumstances in this case that raise constitutional questions:

First, the amended complaint alleges the final Approved Jurisdictional Determination was issued on remand without correcting the deficiencies the Corps Review Officer documented on administrative appeal. Hawkes was deprived of an impartial hearing.

Second, as the Eighth Circuit observed: "the Amended Complaint alleged that the Corps' District representative repeatedly made it clear to Kevin Pierce, to a Hawkes employee, and to the landowner that a permit to mine peat would ultimately be refused." Pet. App. at 14a. On these facts, it would be futile to impose a permit requirement on Hawkes to "ripen" the case for judicial review.

Third, the documented cost (in money and delay) of an individual permit is prohibitive and punitive, perhaps beyond the reach of Hawkes. If a permit is required for judicial review under the APA, that cost and delay could never be recovered. Pet. App. at 14a.

Fourth, the permit requirement does not and cannot advance the case because the Jurisdictional Determination is conclusive as to jurisdiction. The permit process serves no meaningful purpose; it is an arbitrary barrier to timely redress in court. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

And fifth, the permit requirement is inconsistent with the plain language of the APA and Corps regulations that say the JD is final agency action. *See* 33 C.F.R. §§ 320.1; 329.3.

In *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005), this Court cited the constitutional avoidance canon for the proposition that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." According to this Court, "one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* at 381. And further, "[t]he canon is thus a means of giving effect to congressional intent, not of subverting it." *Id.* at 382.

In this case, this Court must choose between the implausible interpretation that the APA requires an aggrieved party to obtain a costly and needless permit as a predicate for judicial review, on the one hand, and immediate judicial review of a binding, site-specific adjudicative Jurisdictional Determination, on the other. The former raises a multitude of constitutional questions. The latter reinforces the purpose and intent of Congress—"the strong presumption that Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670.

CONCLUSION

Landowners should have the right to challenge agency overreaching in court, especially a contested "threshold determination that puts the administrative process in motion." Pet. App. at 20a (Kelly, J., concurring). The only practical way for that to happen is through immediate judicial review of Approved

Jurisdictional Determinations under the APA. A JD has all the hallmarks of final agency action, but a landowner has no adequate remedy in court. *See* 5 U.S.C. § 704.

This Court should therefore sustain the Eighth Circuit decision below.

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Respectfully submitted,

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